Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS, CLERK

83-508

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

FOOD TOWN STORES, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; ELEANOR HOLMES NORTON; and JAMES H. TROY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether an administrative agency can promulgate and follow a regulation (29 C.F.R. § 1601.16(a)) that conflicts directly with statutes enacted by the United States Congress (42 U.S.C. § 2000e-9 and 29 U.S.C. § 161)?

PARTIES TO THE PROCEEDING

Food Town Stores, Inc. has changed its name to Food Lion, Inc. Delhaize Freres & Cie. "Le Lion," S.A. is a majority shareholder of Food Lion, Inc., and Food Town Liquors, Inc. is a subsidiary of Food Lion, Inc.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (A-4)[1*] is officially reported as Food Town Stores, Inc. v. EEOC, 708 F.2d 920 (4th Cir. 1983).

The memorandum opinion of the United States District Court for the Middle District of North Carolina (A-31) is unreported. The second memorandum opinion of the United States District Court for the Middle District of North Carolina reversing the first opinion and granting the EEOC's motion for summary judgment is also unreported. (A-62).

1* "A-__" references are to the Appendix pages immediately following this Petition.

GROUNDS FOR JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 1983. On June 3, 1983, a petition for rehearing was filed and June 28, 1983 the petition for rehearing was denied. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Statutes: 28 U.S.C. § 1331, 28 U.S.C. § 1337(a), 28 U.S.C. § 1346(a)(2), 28 U.S.C. § 1361, 28 U.S.C. § 2201, 28 U.S.C. § 2202, 29 U.S.C. § 161, 42 U.S.C. § 2000e-9, and 42 U.S.C. § 20000-16(d).

Regulation: 29 C.F.R § 1601.16.

STATEMENT OF THE CASE

Food Town Stores, Inc. ("Food Town"), filed this action pursuant to 28 U.S.C. §§ 2201 and 2202 seeking declaratory and injunctive relief from the portion of 29 C.F.R. § 1601.16(a) which prohibits the issuance of subpoenas to parties to Equal Employment Opportunity Commission ("Commission") investigations. The bases for jurisdiction in the federal court of first instance, the Middle District of North Carolina, were 28 U.S.C. §§ 1331(a), 1337(a), 1346(a)(2), and 1361. Food Town contends that this regulation is invalid because it conflicts with, and contradicts, 42 U.S.C. § 2000e-9 and 29 U.S.C. § 161. The Equal Employment Opportunity Commission, Eleanor Holmes Norton, and James H. Troy (hereinafter

collectively "EEOC") filed a motion to dismiss which the district court initially denied. (A-34). Subsequently, considering cross motions for summary judgment, the district court reversed its ruling and dismissed the case for lack of subject matter jurisdiction. The district court, in the alternative, granted the EEOC's motion for summary judgment, holding that the regulation is valid. (A-74). Food Town appealed to the Fourth Circuit Court of Appeals which upheld the decision of the District Court that the regulation was valid. (A-4). Food Town petitioned for rehearing with a suggestion of rehearing en banc; both were denied. (A-2).

The background facts leading to this case bear note. Food Town received notice that former EEOC Commissioner Ethel

Bent Walsh had filed a sworn charge of discrimination against it. (A-7). The EEOC, through its Charlotte District Director, James H. Troy, began an investigation of this charge. Mr. Troy issued a subpoena directing Food Town to produce numerous documents. (A-8). In accordance with 29 C.F.R. § 1601.16(b), Food Town petitioned the EEOC to revoke the subpoena. One of the grounds for Food Town's petition to revoke was that former Commissioner Walsh's charge was insufficient to support the investigation and subpoena because she lacked the necessary factual basis to swear to the charge. (A-65). In order to establish this defense to the subpoena, Food Town requested Mr. Troy to provide it with a subpoena to compel the testimony of former

Commissioner Walsh. (A-65). Relying on the regulation that Food Town contends is invalid, 29 C.F.R. § 1601.16(a), Mr. Troy refused to issue the subpoena. (A-8). The plaintiff then filed this action seeking a declaration that 29 C.F.R. § 1601.16(a) conflicts with 42 U.S.C. § 2000e-9 and 29 U.S.C. § 161 to the extent that the regulation prohibits the issuance of subpoenas at the request of parties to Commission investigations and, therefore, is invalid.[2*]

2* Food Town also sought a preliminary injunction staying the subpoena revocation proceedings before the EEOC pending resolution of this action. (A-4, A-31). The district court denied this request for injunctive relief. Food Town Stores v. EEOC, 27 F.E.P. Cases 1367 (M.D.N.C. 1980). The request for a stay of the subpoena revocation proceedings is now moot, however, because the district court refused to enforce the EEOC's sub-

REASONS FOR ALLOWANCE OF THE WRIT

1. The Action Involves Important Questions of Federal Law Which Should Be Settled By This Court

The question before this Court is whether an administrative agency, the EEOC, can promulgate and follow a regulation that denies a respondent in an EEOC investigation the right to demand issuance of a subpoena (29 C.F.R. § 1601.16(a)), when that regulation conflicts directly with statutes enacted by the United States Congress which require the EEOC to forthwith issue a subpoena to any party to an

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Footnote Continued

ever, because the district court refused to enforce the EEOC's subpoena. EEOC v. Food Town Stores, 27 F.E.P. Cases 109, 111 (M.D.N.C. 1981). Food Town has not appealed the denial of a preliminary injunction.

EEOC investigative proceeding (42 U.S.C. § 2000e-9 and 29 U.S.C. § 161). There is no conflict in the circuits on this issue, but the Petitioner urges the courts below have never really addressed the obvious conflict between the statutes and the regulation, but rather have disposed of all cases on grounds of public policy. This Court should allow the writ in order to determine with finality the meaning of the obvious conflict between the statutes and regulation.

At the outset, an analysis of the statutory framework and regulatory interrelationships is vital. Title VII of the Civil Rights Act of 1964, as amended in 1972, incorporates 29 U.S.C. § 161. Section 11 of the Labor Management Relations Act, 42 U.S.C. § 2000e-9, 29 U.S.C. § 161, provides in part:

> For the purpose of all hearings and investigations, . . .
>
> (1) The Board . . . shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board . . . shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. . . .

(Emphasis added). The regulation, 29 C.F.R. § 1601.16(a), provides, however:

> Neither the person claiming to be aggrieved, the person filing a charge on behalf of such person nor the respondent shall have the right to demand that a subpoena be issued.

The statute, in clear concise language, requires the EEOC to "forthwith issue" to

any party a subpoena requiring the testimony or production of any evidence in a proceeding or investigation. The regulation, on the other hand, specifically denies any party to any EEOC proceeding the right to demand a subpoena. The conflict is patent.

A fundamental precept of American administrative law is that an agency has no life of its own; its powers and authority arise only from, and are strictly limited by, the Acts of Congress. Agency regulations which conflict with an Act of Congress are void. United States v. Larionoff, 431 U.S. 864, 873 (1977). The EEOC's regulation denying parties the right to demand a subpoena contradicts directly a statute providing the parties with the right to obtain a subpoena.

Therefore, the regulation should be held invalid.

To avoid this obvious conflict, the circuit court below interpreted the statute. The Circuit Court failed, however, to find first that the statute in question was ambiguous and, therefore, required interpretation by the court. The Fourth Circuit looked to the National Labor Relations Board ("NLRB") interpretation of § 161 of the National Labor Relations Act, which is not to require the issuance of investigative subpoenas to private parties, as support for the Fourth Circuit's interpretation of the statute. There are, however, substantial differences between EEOC and NLRB power. Congress, in 1972, deleted provisions of Title VII of the Civil Rights Act of 1964,

42 U.S.C. § 2000e, et seq. ("Title VII"), from the 1972 Title VII amendments which would have granted the EEOC adversary hearing and cease and desist powers similar to the powers of the NLRB. Despite the differences between the powers of the two agencies, the court below looked to Martin's Ferry Hospital Ass'n v. NLRB, 654 F.2d 455 (6th Cir. 1981), cert. denied, 454 U.S. 1083 (1981) and Schrementi Bros. v. McCulloch, 69 L.R.R.M. 223 (N.D.Ill. 1968), which upheld the NLRB's practice with regard to NLRB investigative subpoenas. These two cases focused on the distinction between Labor Board "investigations" and "proceedings." Both courts recognized that a party to a Labor Board "proceeding" after the issuance of a complaint by the Board, is entitled to obtain

a subpoena. Martin's Ferry and Schrementi then found a "possible statutory ambiguity" in Congress' use of the word "proceeding" in 29 U.S.C. § 161 to justify an interpretation of that statute and upheld the NLRB's practice of denying investigative subpoenas. While such a resolution might be justifiable in NLRB cases, there is no ambiguity in this statute in the Title VII context because unlike the NLRB the EEOC has no adjudicatory powers, and there is no reasonable distinction between the EEOC's investigations and the proceedings.

Second, The Fourth Circuit's reliance upon an analysis of the legislative history of Title VII to support an interpretation of this statute is misplaced. When the proposed provisions

of Title VII giving the EEOC adjudicatory powers were discarded by Congress, the Legislative History, which contained an integrated section-by-section analysis, became meaningless for the portions of Title VII that were actually enacted. The analysis quoted by the appellate court below in its initial decision at page 11 consequently is taken out of context. Further, to hold that the 1972 amendments incorporating § 161 into Title VII was intended to give the EEOC NLRB investigative powers completely overlooks the indisputable fact that the EEOC already possessed, prior to 1972, investigative powers equal to the NLRB. 42 U.S.C. § 2000e-8(a). In reviewing the statute, the Fourth Circuit should not have assumed Congress would enact

redundant and unnecessary legislation. The 1972 amendments clearly provide additional subpoena rights to parties to an EEOC investigation, and the plain language of the statute should have been followed.

Pointing to language in the second-by-section analysis of the Legislative History that 29 U.S.C. § 161 was incorporated into Title VII "only to the extent appropriate" and holding that Congress "thereby conferred discretion upon the EEOC to promulgate appropriate guidelines for the use of 29 U.S.C. § 161 powers in EEOC investigations" completely overlooks the fact that the statute did not contain such language. In the same 1972 Act which incorporated all of 29 U.S.C. § 161 into Title VII, Congress did use such language in another provision

that extends coverage to employees of the federal government. Congress specified that the "provisions of Section 706(f) through (k), as applicable, shall govern civil actions brought hereunder." 42 U.S.C. § 2000e-16(d). (Emphasis added). Congress knew how to include language incorporating only certain portions of the statute when it incorporated existing provisions of federal law in a new statute. Yet, Congress included no such provision when it incorporated 29 U.S.C. § 161 into 42 U.S.C. § 2000e-9. Even if the "to the extent appropriate" language had been included in the statute, it would not have authorized the EEOC to promulgate a substantive or even an interpretative regulation broadening the EEOC's power and directly contradicting the plain language

of the statute granting subpoena rights. General Electric Co. v. Gilbert, 429 U.S. 125, 141 (1976). Such a regulation exceeds the authority of the EEOC and is entitled to little or no deference according to the more recent "deference" decisions of the United States Supreme Court.

In its construction of the statute, the Fourth Circuit honed in on the purpose for which Food Town intended to use the subpoena it requested from the EEOC. Speculating that allowing parties to obtain subpoenas pursuant to statutory language would cause extensive delays in EEOC investigations cannot justify rewriting the statute. It is just as easy to speculate that Congress intended, by the grant of the subpoena right, to encourage the EEOC to abide by the law and

fulfill the prerequisites for filing valid charges and conducting thorough and complete investigations.

2. The Judgment Is In Conflict, In Principle, With Decisions of This Court

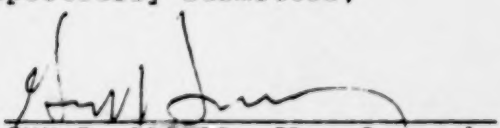
The Fourth Circuit decision disregards the plain meaning of the statute. When confronted with a statute such as 29 U.S.C. § 161, which is clear on its face, the court ordinarily should not look to legislative history as a guide to its meaning. Tennessee Valley Authority v. Hill, 437 U.S. 153, 184 n. 29. The Court should only reject the apparent meaning of the statutory language "in rare and exceptional circumstances." Rubin v. U.S., 449 U.S. 424, 430 (1978). Legislative History read out of context cannot rise to the substantial, unambiguous evidence test.

Nor does concern about delay erode unambiguous language.

CONCLUSION

WHEREFORE, because there is a compelling question involving construction and interpretation of a major federal statute, this Petitioner urges and requests that its petition for certiorari be allowed.

Respectfully submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1564

Food Town Stores, Inc.

Appellant,

versus

Equal Employment Opportunity Commission; Eleanor Holmes Norton, in her official capacity & as Chair of EEOC and James H. Troy, in his official capacity as District Director of EEOC,

Appellees.

O R D E R

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Ervin for a panel consisting of Judge Murnaghan, Judge Ervin, and Judge Fairchild.

For the Court
s/ William K. Slate, II

Filed: 6/28/83
U. S. Court of Appeals
Fourth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1564

Food Town Stores, Inc.,

Appellant,

v.

Equal Employment Opportunity Commission; Eleanor Holmes Norton, in her official capacity and as Chair of EEOC and James H. Troy, in his official capacity as District Director of EEOC,

Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Eugene A. Gordon, District Judge.

Before MURNAGHAN and ERVIN, Circuit Judges, and FAIRCHILD, Senior Circuit Judge.

Argued: February 8, 1983
Decided: May 23, 1983

Guy F. Driver, Jr. (David A. Irvin, Francis C. Clark, Womble Carlyle Sandridge & Rice on brief) for Appellant; Diane B. Johnston (Michael N. Martinez, General Counsel (Acting), Phillip B. Sklover, Associate General Counsel, Vincent Blackwood, Assistant General Counsel, Warren Bo Duplinsky on brief) for Appellee.

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*Honorable Thomas E. Fairchild, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

ERVIN, Circuit Judge:

This is an appeal by Food Town Stores, Inc. ("Food Town") from the United States District Court for the Middle District of North Carolina. Food Town brought this action seeking to compel the Equal Employment Opportunity Commission ("EEOC") to issue a subpoena during the investigation of a charge of employment discrimination against Food Town. The district court dismissed Food Town's complaint on the ground that it lacked subject matter jurisdiction. In the alternative, the district court granted the EEOC's motion for summary judgment, holding that the EEOC was not required to issue the subpoena. Because we conclude that the EEOC was not required to issue the subpoena, we affirm.

I

On July 11, 1979, Ethel Bent Walsh, then an EEOC commissioner, filed a charge against Food Town alleging violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. In investigating the charge, the EEOC made a number of requests for information from Food Town. Food Town refused to respond fully and wrote to Commissioner Walsh asking her to substantiate the factual basis of the charge. Walsh responded that she could not supply that substantiation. Food Town then, relying on 29 U.S.C. § 161, asked the EEOC to issue a subpoena to compel the testimony of Commissioner Walsh concerning the factual basis of the charge. 29 U.S.C. § 161 provides, in pertinent part:

> The [EEOC] or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application.

The EEOC denied this request, relying on 29 C.F.R. § 1601.16(a), which provides that:

> Neither the person claiming to be aggrieved, the person filing a charge on behalf of such person nor the respondent shall have the right to demand that a subpoena be issued.

When Food Town continued to refuse to supply the information requested by the EEOC, the EEOC issued a subpoena for the information. Food Town responded by petitioning the EEOC to revoke the subpoena.

On May 23, 1980, while that petition was pending, Food Town filed this action seeking to compel the EEOC to issue a subpoena requiring Commissioner Walsh to submit to a deposition for the sole purpose of substantiating the factual basis of the EEOC's charge. Food Town alleged that Commissioner Walsh's testimony was necessary in order for Food Town to support its pending petition to revoke the EEOC's subpoena or to resist any EEOC attempt to enforce its subpoena. Food Town argued that 29 C.F.R. § 1601.16(a) is invalid because it conflicts with 29 U.S.C. § 161.

Food Town's petition to the EEOC to revoke the EEOC's subpoena against Food Town was denied and on April 1, 1981, the EEOC commenced subpoena enforcement

proceedings against Food Town in the district court. Food Town eventually agreed to comply with the EEOC subpoena.

Food Town nevertheless continued this action seeking to compel the EEOC to issue the subpoena against Commissioner Walsh. On May 26, 1982, the district court dismissed the action for lack of subject matter jurisdiction because it found that the United States' sovereign immunity had not been waived. The district court also ruled, in the alternative, that if it did have jurisdiction, it would grant the EEOC's motion for summary judgment because 29 C.F.R. § 1601.16(a) did not conflict with 29 U.S.C. § 161. This appeal followed.

II.

Food Town's first contention is that the district court erred in holding that it did not possess subject matter jurisdiction. We agree.

Food Town's claims concerning the conflict between 29 C.F.R. § 1601.16(a) and 29 U.S.C. § 161 and the EEOC's resulting refusal to issue the subpoena clearly present a question arising under a federal statute within the meaning of 28 U.S.C. § 1331(a). Such federal question jurisdiction is not defeated by the absence of a special statutory procedure for obtaining judicial review; 29 U.S.C. § 1331(a) grants jurisdiction in the district courts for "nonstatutory review" actions. See Califano v. Sanders, 430 U.S. 99, 105 (1977).

Although this action is nominally against a federal agency and federal officers, it is in fact against the United States. See Hawaii v. Gordon, 373 U.S. 57, 58 (1963). The doctrine of sovereign immunity therefore applies; Food Town may proceed against the United States only if the United States has consented to the suit. United States v. Testan, 424 U.S. 392, 399 (1976). Absent such a statutory waiver of immunity, the district court was without 28 U.S.C. § 1331(a) federal question jurisdiction. Jaffee v. United States, 592 F.2d 712, 718 (3d Cir. 1979), cert. denied, 441 U.S. 961 (1979); Estate of Watson v. Blumenthal, 586 F.2d 925, 929 (2d Cir. 1978).

In 5 U.S.C. § 702, Congress has waived sovereign immunity in "nonstatutory

review" cases wherein nonmonetary relief is sought. See Warin v. Director, Department of Treasury, 672 F.2d 590, 592 (6th Cir. 1982); Beller v. Middendorf, 632 F.2d 788, 797 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981); Johnsrud v. Carter, 620 F.2d 29, 31 (3d Cir. 1980). The agency action must be "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. By definition, the promulgation of the questioned regulation and its enforcement (i.e., the failure to issue the subpoena) are agency actions. 5 U.S.C. § 551(13). The dispute here concerns whether those actions are "final agency action[s]."

The district court held that there had been no final agency action. The district court first noted that an

EEOC reasonable cause determination is not "final agency action." See Georator Corp. v. E.E.O.C., 592 F.2d 765 (4th Cir. 1979). The district court then reasoned that any EEOC action leading up to that determination likewise could not be final. Since the EEOC's promulgation of the regulation and failure to issue the subpoena are actions leading up to the reasonable cause determination, the district court concluded that those actions are not final agency actions and, thus, the 5 U.S.C. § 702 waiver does not apply. We reject the district court's reasoning.

The promulgation of 29 C.F.R. § 1601.16(a) is a final action because that regulation is "definitive," not "informal . . . or only the ruling of a subordinate official . . . or tentative;"

the "process of rule making was complete" and Food Town "claimed to be 'aggrieved.'" Abbot Laboratories v. Gardner, 387 U.S. 136, 151 (1967) (Food and Drug Commission regulation final agency action upon promulgation) (citations omitted).3* The failure to issue the subpoena also is a final action because it has "determinant

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3* The EEOC's attempt to distinguish Abbott Laboratories is not persuasive. The EEOC argues that the test of finality applied therein is applicable only to substantive regulations, and not to procedural regulations such as 29 C.F.R. § 1601.16(a). The is no language in the case, however, that supports the proposition that finality can turn on a substantive-procedural distinction. Furthermore, that case and the present one are alike in the key aspect; both involve a definitive regulation that affected the legal right (e.g., right to have subpoena issued) of the aggrieved plaintiff.

consequences." Georator, 592 F.2d at 768. That failure denied Food Town its right, asserted under 29 U.S.C. § 161, to have the subpoena issued, which denial is a "determinant consequence." See Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 589 n. 8 (D.C. Cir. 1971) (test of finality "is not whether the order is the last administrative order contemplated by the statutory scheme, but rather whether it imposes an obligation or denies a right").4*

4* The EEOC claims that Food Town suffered no "determinant consequences" because it would have an opportunity to respond to any Title VII charges in the district court before liability could be imposed. "Determinant consequence," however, is not synonymous with "liability." A "determinant consequence" can occur when a party is aggrieved by the denial of a statutory right. That Food Town ultimately may not

Furthermore, there is no support for the reasoning that all EEOC actions prefatory to the nonfinal reasonable cause determination are likewise nonfinal.

Footnote Continued

be found liable for a Title VII violation is irrelevant to the question whether Food Town was denied the statutory right. Food Town is not aggrieved by the refusal to issue the subpoena only when that refusal leads to liability; it is aggrieved simply by the refusal to issue the subpoena. Furthermore, contrary to the EEOC's suggestions, Food Town would not have an adequate remedy in a subsequent Title VII trial. That trial is de novo on the merits. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 799 (1973). The EEOC regulation and failure to issue the subpoena would not be reviewable in that action. The prior administrative record is not considered in the district court and Food Town could not set forth as a defense procedural irregularities in the administrative proceedings.

Since finality can occur when a party is deprived of a statutory right, as well as when liability is imposed, the focus should be on the nature of the consequence accruing from the EEOC's action, not on what stage in the proceedings the action occurred. It is illogical to immunize EEOC promulgated regulations from judicial review merely because their enforcement would be prefatory to a reasonable cause determination. This is especially so where, as here, the regulation allegedly deprives a party of a statutory right, which deprivation subsequently is not reviewable in the district court trial. Thus it cannot be that federal courts lack jurisdiction over challenges to EEOC regulations. Indeed, if such were the law, then this court could not have entertained

the challenge to the EEOC disclosure regulations in E.E.O.C. v. Joseph Horne Co., 607 F.2d 1075 (4th Cir. 1979), rev'd sub nom., E.E.O.C. v. Associated Dry Goods Corp, 449 U.S. 590 (1981).

We therefore conclude that the promulgation of 29 C.F.R. § 1601.16(a) and its enforcement against Food Town are, within the meaning of 5 U.S.C. § 702, final agency actions for which there is no other adequate remedy in a court. Sovereign immunity thus is waived, and the district court possessed subject matter jurisdiction over this action.[5*]

5* We note that Food Town did not allege jurisdiction under 28 U.S.C. § 1361. That provision grants jurisdiction to the district courts over any mandamus action to compel an officer of the United States or agency thereof to perform a duty owed to the plaintiff. Because we

III

Having concluded that the district court erred in dismissing the action for lack of jurisdiction, we now must turn to a review of its alternative holding granting summary judgment in the EEOC's favor on the question whether 29 C.F.R. § 1601.16(a) is valid. We note at the outset that the two other courts that have considered this question have resolved it in the EEOC's favor. E.E.O.C. v. Suburban Transit System, 28 FEP 419 (N.D.Ill. 1982); E.E.O.C. v. Goodyear Tire & Rubber Co., 21 FEP 1631 (N.D. Ohio 1979).

Footnote Continued

hold that jurisdiction exists under 28 U.S.C. § 1331, we do not decide whether jurisdiction also exists under 28 U.S.C. § 1361.

In 1972, as part of the wholesale revision to Title VII, Congress incorporated 29 U.S.C. § 161, which grants investigatory powers to the National Labor Relations Board ("NLRB"), into Title VII. 42 U.S.C. § 2000e-9. Among 29 U.S.C. § 161's many parts is the provision that the "Board shall . . . upon application of any party . . ., forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses." Food Town argues that this provision grants Food Town the absolute right to a subpoena of any party, including EEOC officials, at any stage in an EEOC proceeding and tnat 29 C.F.R. § 1601.16(a) plainly conflicts with the provision since it provides that a party does not "have the right to demand that a subpoena be issued." We cannot agree.

We are mindful that in interpreting a statute, we must not be guided by a single sentence, but rather must look to the provisions of the whole law, ascertain legislative intent, and give effect to that intent. Philbrook v. Glodgett, 421 U.S. 707, 713 (1975). A statute must be interpreted to give it the single, most harmonious, comprehensive meaning possible in light of the legislative policy and purpose. Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 631-32 (1973). Where "an absolutely literal reading of a statutory provision is irreconcilably at war with the clear congressional purpose, a less literal construction must be considered." United States v. Campos-Serrano, 404 U.S. 293, 298 (1977).

The NLRB consistently has interpreted § 161 not to require the issuance of investigative subpoenas to private parties. This policy has been upheld by the courts. See Martins Ferry Hospital Ass'n v. National Labor Relations Board. 654 F.2d 455 (6th Cir. 1981), cert. denied, 454 U.S. 1083 (1981); Schrementi Bros. v. McCulloch, 69 LRRM 2233 (N.D.Ill. 1968). The legislative history of the 1972 Title VII amendments indicates that Congress intended to incorporate the NLRB's investigative subpoena policy into Title VII.

In 1971, bills were introduced in both the Senate and House of Representatives to strengthen the role of the EEOC in enforcing Title VII. S. 2515, 92d Cong., 1st Sess. (1971); H.R. 1746, 92d

Cong. 1st Sess. (1971). The bills were modeled after the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 141, et seq., and granted the EEOC procedures and powers similar to those vested in the NLRB. See Legislative History to Equal Employment Opportunity Act of 1972 at 192, 682, 692, 798, 836, 838 (1972). Thus, 29 U.S.C. § 161 was incorporated into Title VII, and as indicated by the section-by-section analysis, the EEOC, like the NLRB, would not be required to issue investigative subpoenas under that section.

> Under this section, the Commission would not be authorized to issue a subpoena on the application of a private party before it issues a complaint and notice of hearing. This provision, which is in accord with the actual practice of National Labor Relations Board, would give the Commission

> exclusive authority to conduct the prehearing investigation.

Section-by-Section Analysis of S. 2515, reprinted in Legislative History of the Equal Employment Opportunity Act of 1972 at 1977 (1972).

While opponents to the proposed amendments succeeded in deleting provisions granting the EEOC NLRB-like adversary hearing and cease and desist powers, the enacted amendments nevertheless did include the incorporation of the NLRB investigative powers contained in 29 U.S.C. § 161. That incorporation was not changed from the originally proposed bill and we see no reason why the above section-by-section analysis does not reflect Congressional intent concerning EEOC investigative subpoenas.

Furthermore, in incorporating 29 U.S.C. § 161, Congress did not intend that all the provisions of the section be mechanically applied to Title VII. The section-by-section analysis of both the Senate and House versions of the enacted amendments indicate that the provisions of 29 U.S.C. § 161 are to be made applicable to EEOC investigations only "to the extent appropriate." Section-by-Section Analysis of H.R. 1746 and S. 2515, reprinted in, Legislative History of the Equal Employment Opportunity Act of 1972 at 1775, 1849. Congress thereby conferred discretion upon the EEOC to promulgate appropriate guidelines for the use of 29 U.S.C. § 161 powers in EEOC investigations. We believe that the EEOC's investigative subpoena regulation, 29 C.F.R. § 1601.16(a),

is such an appropriate guideline. The regulation is consistent with congressional intent and the NLRB's long-standing interpretation of 29 U.S.C. § 161. In this situation, the EEOC is entitled to great deference. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

We also are persuaded by the reasoning in E.E.O.C. v. K-Mart Corp., 694 F.2d 1055 (6th Cir. 1982). That case involved subpoena enforcement proceedings brought by the EEOC against K-Mart. In defending against enforcement, K-Mart, pursuant to the district court's discovery order, obtained subpoenas for the depositions of certain EEOC officials. The Sixth Circuit reversed the discovery order, reasoning that it was inconsistent with the enforcement scheme of Title VII.

> Congress did not intend . . . to allow extensive delay in the disposition of Title VII cases. Title VII was enacted to eliminate discrimination in employment on account of race, color, religion, sex, or national origin. The EEOC was given investigatory power to prevent and remedy discrimination in employment. Requiring the EEOC to justify each charge would divert the EEOC from its primary purpose of determining whether there has been a violation of Title VII. (citations omitted).

Id. at 1067-68. The court held that discovery is appropriate only where the private party makes a substantial showing of abuse of process, i.e., EEOC investigation for harassment or for other ulterior or improper purpose, by the EEOC, which showing K-Mart failed to make.6*

6* Food Town has made no substantial showing of abuse of process by the EEOC. Indeed, Food Town's alleged reason for the subpoena, to defend against the EEOC subpoena enforce-

The present case, of course, does not involve an issue of the permissible scope of discovery in a subpoena enforcement proceeding. Nevertheless, the prospect of extensive delay in EEOC investigations, a risk especially inherent in private party subpoenas of EEOC officials, is a significant consideration in our decision inasmuch as we believe that 29 C.F.R. § 1601.16(a) properly and necessarily shields Title VII's enforcement scheme from such extensive delay.

Footnote Continued

ment proceedings, was mooted when Food Town agreed to comply with the EEOC subpoena.

IV

For the foregoing reasons, the district court's grant of summary judgment in favor of the EEOC is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
SALISBURY DIVISION

FOOD TOWN STORES, INC.,	)	
Plaintiff,	)	C-80-240-S
v.	)	
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; ELEANOR HOLMES NORTON, in her official capacity as Chair of the Equal Employment Opportunity Commission, and JAMES H. TROY, in his official capacity as District Director of the Equal Employment Opportunity Commission,	)	
Defendants.	)	

MAGISTRATE'S FINDINGS AND RECOMMENDATIONS

The plaintiff filed this action against the defendants seeking declaratory and injunctive relief for the defendants'

failure to issue a subpoena in accordance with 42 U.S.C. § 2000e-9 and 29 U.S.C. § 161.[7*] Plaintiff also sought a preliminary injunction staying a subpoena revocation proceeding that was pending at the time this action was initiated. The Equal Employment Opportunity Commission (EEOC) had initiated an investigation of the

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7* 42 U.S.C. § 2000e-9 provides: "For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of Title 29 shall apply.

29 U.S.C. § 161 provides in part: "For the purpose of all hearings and investigations . . . The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. . . ."

plaintiff based upon a charge of employment discrimination. Plaintiff requested from defendant Troy the issuance of a subpoena pursuant to 42 U.S.C. § 2000e-9 and 29 U.S.C. § 161; the subpoena was to be served on EEOC Commissioner Ethel Bent Walsh. Defendant Troy refused to issue the subpoena requested by the plaintiff; the refusal was based upon 29 C.F.R. § 1601.16(a).[8*] On August 14, 1980, an order was entered denying plaintiff's motion for a preliminary injunction.

8* 29 C.F.R. Part 1601, Procedural Regulations, 16(a), provides in part: "Neither the person claiming to be aggrieved, the person filing a charge on behalf of such person nor the respondent shall have the right to demand that a subpoena be issued."

The defendants have made a motion to dismiss the complaint. Defendants claim that the action should be dismissed because the Court lacks subject matter jurisdiction of the action, the action is not ripe for adjudication, and the complaint fails to state a claim upon which relief can be granted. This Court has examined the motion and responses and recommends that an order be entered denying the defendants' motion.

I.

Plaintiff contends that the provision of 29 C.F.R. § 1601.16(a) prohibiting the issuance of a subpoena on the request of a respondent contradicts and conflicts with 42 U.S.C. § 2000e-9 and 29 U.S.C. § 161. Plaintiff claims that this Court has subject matter jurisdiction

of this action under 28 U.S.C. §§ 1331(a), 1337(a), 1346(a)(2), and 1361.

In support of their motion to dismiss, defendants contend that this Court does not have jurisdiction over this action under any of these statutes. Despite defendants' arguments to the contrary, the Court finds that it does have subject matter jurisdiction of this action under 28 U.S.C. § 1331(a).

28 U.S.C. § 1331(a) provides:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, law, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

The language eliminating the $10,000 jurisdictional amount requirement where the action is brought against the United States, any agency thereof, or any officer or employee, was added by amendment effective October 21, 1976. Pub.L. 95-574, § 2, 90 Stat. 2721.

In support of their motion to dismiss, defendants contend that plaintiff's claims concerning the conflict between 29 C.F.R. § 1601.16, and 29 U.S.C. § 161 and 42 U.S.C. § 2000e-9 do not "arise under" the Constitution, laws, or treaties of the United States. Defendants assert that an action does not "arise under" federal law where plaintiff fails to state a claim under any federal statute or constitutional provision. Defendants contend plaintiff has presented no such

claim. As a result, defendants contend that this Court does not have jurisdiction of this action under 28 U.S.C. § 1331(a).

Defendants' assertions are without merit. Subject matter jurisdiction is not defeated by the possibility that the averments of the complaint may fail to state a cause of action. Bell v. Hood, 327 U.S. 678 (1946). Johnsrud v. Carter, 620 F.2d 29 (3rd Cir. 1980). Whether a complaint states a cause of action on which relief could be granted is a question of law which must be decided after the court has assumed jurisdiction over the controversy. Bell v. Hood, supra at 682.

In addition, plaintiff's claims concerning the conflict between a regulation and two statutory sections and the

resulting refusal of the defendant regulatory agency through its employee to issue a subpoena at plaintiff's request, clearly present questions which arise under federal statutes. See Califano v. Sanders, 430 U.S. 99 (1977); Sharrock v. Harris, 473 F.Supp. 1173 (S.D.N.Y. 1979). 28 U.S.C. § 1331(a) grants jurisdiction in the federal courts to review administrative activity which adversely affects private persons, where no special procedure for review of the activity has been created. Sharrock v. Harris, supra at 1175; H.R.Rep. No. 94-1656, 94th Cong., 2d Sess. 5, reprinted in [1976] U.S. Code Cong. & Admin. News, pp. 6121, 6125. These actions are referred to as "nonstatutory review" actions and jurisdiction for these review procedures is in

the United States district courts. H.R.Rep. No. 94-1656, 94th Cong., 2d Sess. 5, reprinted in [1976] U.S. Code Cong. & Admin. News, p. 6125; Sheehan v. Army and Air Force Exchange Service, 619 F.2d 1132, 1138-39 (5th Cir. 1980).

Plaintiff has initiated this action against an agency of the federal government and employees of the agency in their official capacity. Although the action is nominally against a federal agency and federal officers, it is in fact against the United States. Sharrock v. Harris, supra at 1175; Neal v. Secretary of the Navy, 472 F.Supp. 763 (E.D.Pa. 1979). Therefore, the action is limited by the doctrine of sovereign immunity; the plaintiff may proceed against the United States only if Congress has waived the

immunity by statute. United States v. Testan, 424 U.S. 392 (1976); Jaffee v. United States, 592 F.2d 712 (3rd Cir.), cert. denied, 441 U.S. 961 (1979). Absent a statutory waiver of sovereign immunity, the court is without subject matter jurisdiction of this action under 28 U.S.C. § 1331(a). Jaffee v. United States, supra at 718; Estate of Watson v. Blumenthal, 586 F.2d 925 (2nd Cir. 1978).

The Administrative Procedure Act, 5 U.S.C. § 702, was amended by the same legislation which eliminated the jurisdictional amount requirement in suits against the United States, its agencies and officers under 28 U.S.C. § 1331(a). Congress intended that the amendment to 5 U.S.C. § 702 would, under some circumstances, waive sovereign immunity. Jaffee

v. United States, supra at 718; H.R.Rep. No. 94-1656, 94th Cong., 2d Sess. 1, reprinted in [1976] U.S. Code Cong. & Admin. News, pp. 6121, 6125. This Court finds that the legislative history establishes that amended Section 702 waives sovereign immunity in a "nonstatutory" review of agency action under 28 U.S.C. § 1331(a), although this statutory construction has not been accepted by all of the circuits. H.R.Rep. No. 94-1656, 94th Cong., 2d Sess. 1, reprinted in [1976] U.S. Code Cong. & Admin. News, pp. 6121-6131; Jaffee v. United States, supra at 718; Johnsrud v. Carter, supra at 30-31; Sheehan v. Army and Air Force Exchange Service, supra at 1139; Collyard v. Washington Capitals, 477 F.Supp. 1247 (D.Minn. 1979); contra

Estate of Watson v. Blumenthal, supra. By waiving sovereign immunity in suits for "relief other than money damages," the Congress sought to "facilitate nonstatutory judicial review of Federal administrative action. . . ." H.R.Rep. at 19, U.S. Code Cong. & Admin. News at p. 1640. Jaffee v. United States, supra at 719. In the equitable action before the Court, the plaintiff seeks nonstatutory review of a federal administrative action under 28 U.S.C. § 1331(a); therefore, sovereign immunity has been waived with respect to this action. Jaffee v. United States, supra at 718-719. This Court has subject matter jurisdiction of the action under 28 U.S.C. § 1331(a). Jaffee v. United States, supra at 719.9*

9* Though counsel did not address the question, 29 U.S.C. § 161(2)

II.

Defendants contend that the present action does not present a case or controversy that is ripe for judicial review, that the Court does not have jurisdiction of the matter as a result, and that the action should be dismissed. Although this Court has already concluded that it has subject matter jurisdiction of the action under 28 U.S.C. § 1331(a) and that sovereign immunity has been waived through 5 U.S.C. § 702, as amended, these amended statutes do not affect any other limitations on judicial review, including

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Footnote Continued

> empowers United States district courts to issue orders compelling the production of evidence and the attendance of witnesses upon application by the Board.

ripeness. H.R.Rep. No. 94-1656, 94th Cong., 2d Sess. 1, reprinted in [1976] U.S. Code Cong. & Admin. News, p. 1632. Declaratory and injunctive relief are discretionary remedies, and the courts have traditionally been reluctant to apply these remedies to administrative determinations unless the remedies are sought in the context of a controversy "ripe" for judicial resolution. Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967). The basic rational of the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effect

felt in a concrete way by the challenging party. Abbott Laboratories v. Gardner, supra at 149.

The Court must make a twofold inquiry to determine whether a challenge to an administrative regulation is ripe for judicial review. Abbott Laboratories v. Gardner, supra at 149; Toilet Goods Assn. v. Gardner, 387 U.S. 158, 160 (1967). The Court must determine whether the issues tendered are appropriate for judicial resolution, and assess the hardship to the parties which will result if judicial consideration is denied. Abbott Laboratories v. Gardner, supra at 149; Toilet Goods Assn. v. Gardner, supra at 162. The tendered issues are appropriate for judicial resolution if: (1) the challenged regulation constitutes "final

agency action" within the meaning of Section 10 of the Administrative Procedure Act, 5 U.S.C. § 704, as construed in judicial decisions, and (2) the issue tendered is a purely legal one. Abbott Laboratories v. Gardner, supra at 149; Booker Custom Packing Co. Inc. v. McLain, 427 F.Supp. 325, 327 (N.D.Tex. 1977).

In the present action, defendants contend that the plaintiff's challenge to 29 C.F.R. § 1601.16(a) is not ripe for judicial review because plaintiff seeks to have the subpoena issued to obtain information to show that a separate charge of discrimination, which has been made against the plaintiff, is defective. Defendants state that a charge of discrimination acts to trigger an investigation by the EEOC; defendants also note

that several administrative steps must be completed before final agency action will result with respect to the discrimination charge. 42 U.S.C. §§ 2000e-5(f)(1), 2000e-6(a) and (c). Defendants contend that neither the issuance of the charge or the initiation of the investigation constitute final agency action within the meaning of Section 10.

The Court is not persuaded by the defendants' argument. The issue tendered by the plaintiff in this case is the conflict between the regulation, 29 C.F.R. § 1601.16(a) and the statutes, 29 U.S.C. § 161 and 42 U.S.C. § 2000e-9. The refusal of defendant Troy to issue the subpoena sought under 29 U.S.C. § 161 due to the prohibition of 29 C.F.R. § 1601.16(a) is final; in addition, the

regulation itself is final within the meaning of Section 10 of the Administrative Procedure Act. Abbott Laboratories v. Gardner, supra at 149; Toilet Goods Assn. v. Gardner, supra at 162; see, Lever Brothers Company v. FTC, 325 F.Supp. 371 (D.Me. 1971); Florida v. Weinberger, 492 F.2d 488 (5th Cir. 1974).

Defendants contend that the issue presented by the plaintiff is not "purely legal" because plaintiff seeks to challenge the regulation to obtain information concerning the factual basis of the charge of discrimination. This argument is without merit; even if successful, the defendants would be prohibited from releasing any information concerning the factual basis of the charge to the plaintiff. 42 U.S.C. §§ 2000e-5(b);

2000e-8(e). In addition, the pleadings in this action clearly establish that the plaintiff instituted this action to challege an EEOC regulation; plaintiff contends that this regulation conflicts with federal statutes. The issue tendered by the plaintiff presents a purely legal question. Toilet Goods Assn. v. Gardner, supra at 163; Abbott Laboratories v. Gardner, supra at 149. As a result, the issues presented by the plaintiff are appropriate for judicial resolution. Abbott Laboratories v. Gardner, supra at 149.

The Court must also assess the hardship to the parties which will result if judicial consideration of the issues presented is denied. The defendants will not suffer any hardship if judicial review

is denied. Defendants contend that the only hardship plaintiff will suffer is the expense of participating in the separate administrative investigation; defendants also contend that the issue presented by the plaintiff herein should be determined only if and when the EEOC finds reasonable cause to believe plaintiff has violated Title VII and the EEOC initiates an appropriate action in federal court. The Court is not persuaded by the defendants' assertions. The hardship which the plaintiff faces, if its challenge to the validity of the regulation prohibiting issuance of the subpoena is not determined, is completely unrelated to the plaintiff's required participation in the administrative investigation. It is also unrelated to the possibility that the issue could be

raised if defendant EEOC initiates a discrimination action against the plaintiff in federal court.

The majority of the cases in which the question of the ripeness of a challenge to an agency regulation arises are cases which involve pre-enforcement judicial review of the regulation. Abbott Laboratories v. Gardner, supra; Toilet Goods Assn. v. Gardner, supra; A. O. Smith Corp. v. FTC, 530 F.2d 515 (3rd Cir. 1976). A much stronger showing of resultant hardship to the challenging party is required where pre-enforcement judicial review is requested than is warranted when the challenged regulation has already been applied to the challenging party. See, Frozen Food Express v. United States, 351 U.S. 40 (1956); Continental

Airlines v. CAB, 522 F.2d 107, 124-125 (D.C.Cir. 1974); Mount Sinai Hospital of Greater Miami, Inc. v. Weinberger, 376 F.Supp. 1099 (S.D.Fla. 1974), reversed on other grounds, 517 F.2d 329 (5th Cir. 1975).

In the present action, the plaintiff has requested the issuance of a subpoena; defendant Troy refused to issue the subpoena due to the prohibition contained in the challenged regulation. If judicial review of the challenge to the regulation is not permitted, the plaintiff will be without a certain forum in which to challenge the basis for the denial of the subpoena. Therefore, the plaintiff will suffer significant hardship if judicial consideration of the issues presented is denied. See, Continental Air Lines, Inc. v. CAB, supra at 124-125.

On the basis of the Court's determination that the issues presented are appropriate for judicial resolution and that the plaintiff will suffer significant hardship if judicial consideration is denied, the Court concludes that the plaintiff's challenge to 29 C.F.R. § 1601.16(a) is ripe for judicial review.

III.

Defendants contend that plaintiff has failed to state a claim upon which relief can be granted and that, as a result, this action should be dismissed. In response, plaintiff contends that it has presented a valid cause of action and is entitled to judicial relief pursuant to the Administrative Procedure Act, 5 U.S.C. § 702. Defendants contend that the plaintiff has failed to state a cause of action

under the Administrative Procedure Act because plaintiff: (1) does not seek judicial review of a final agency action within the meaning of the Act, and (2) the plaintiff has an adequate alternative judicial remedy available to it.

Plaintiff contends that the Administrative Procedure Act authorizes judicial review of the denial of plaintiff's request for issuance of a subpoena pursuant to 29 U.S.C. § 161 and judicial review of the regulation which was the basis of the denial, 29 C.F.R. § 1601.16(a). The existence of the regulation and the refusal to issue the subpoena are each "agency action" within the meaning of the Administrative Procedure Act. 5 U.S.C. §§ 551(13), 551(4); Delaware v. Bender, 370 F.Supp. 1193

(D.Del. 1974). Plaintiff contends that both the regulation and the refusal to issue the subpoena adversely affect the plaintiff.

5 U.S.C. § 704 requires the existence of two conditions before an agency action will be subject to judicial review. Klein v. Commissioner of Patents of the United States, 474 F.2d 821 (4th Cir. 1973). The prerequisites to judicial review are: (1) final agency action and (2) the absence of any other adequate remedy in a court. Klein v. Commissioner of Patents of the United States, supra at 824; Morris v. Gressette, 425 F.Supp. 331 (D.S.C. 1976), affirmed on other grounds, 432 U.S. 491 (1977).

For agency action to be final, it must have some "determinant

consequences for the party to the proceeding." Georator Corp. v. EEOC, 592 F.2d 765, 768 (4th Cir. 1979). "Courts have long considered the touchstone of finality to be the fixing of obligations or legal relationships." Georator Corp. v. EEOC, supra at 768. The defendants in the present action contend that the regulation and the refusal to issue a subpoena occurred in the investigatory portion of the separate EEOC proceeding and was not a final determination which directly affected the plaintiff's rights.

This Court has previously determined that, only with respect to plaintiff's Fifth Amendment claims, the denial of the issuance of the subpoena was not a binding determination of the plaintiff's rights. However, this finding is

not dispositive of the question of whether the regulation and the refusal to issue the subpoena were final agency action within the meaning of 5 U.S.C. § 704. The Court must determine whether the agency action has some "determinant consequences" for the plaintiff.

The plaintiff sought the subpoena while the EEOC proceeding was in the investigatory phase; the subpoena was denied due to the prohibition of 29 C.F.R. § 1601.16(a). The plaintiff has no administrative means available to challenge the denial; the denial of the subpoena was final. The regulation and the refusal to issue the subpoena deny the plaintiff the right, provided in 29 U.S.C. § 161 and 42 U.S.C. § 2000e-9, to have a subpoena issued. Therefore, the agency action has

determinant consequences for the plaintiff and is final within the meaning of 5 U.S.C. § 704. EEOC v. University of New Mexico, Albuquerque, 504 F.2d 1296 (10th Cir. 1974); see Georator Corp. v. EEOC, supra at 768. Agency action is judicially reviewable whether it is deemed affirmative or negative. SCM Corp. v. United States, 450 F.Supp. 1178 (U.S.Cus.Ct. 1978).

Defendants also contend that plaintiff has an adequate alternative judicial remedy. Defendants contend that the plaintiff will have a full opportunity to inquire into the basis of the EEOC's charge against the plaintiff when and if the EEOC brings a discrimination suit in federal court. While plaintiff could challenge the basis of the EEOC charge if

an action were initiated in federal court, plaintiff seeks in the present action to challenge the constitutionality of 29 C.F.R. § 1601.16(a) and the validity of the defendant Troy's refusal to issue the subpoena. Defendants have not shown any alternative forum in which the issues presented by the plaintiff in this action could be raised. Therefore, plaintiff is without any other adequate judicial remedy. See Hall v. EEOC, 456 F.Supp. 695 (N.D.Cal. 1978); Vogel v. Gottschalk, 350 F.Supp. 865 (E.D.Va. 1972).

In this action, plaintiff challenges the constitutionality of a regulation, 29 C.F.R. § 1601.16(a), and contends that it conflicts with and contradicts statutory sections 29 U.S.C. § 161 and 42 U.S.C. § 2000e-9. Where a regulation is

challenged as plainly inconsistent with applicable statutes and appears to frustrate the Congressional intent of the statutes, the action presents a claim for relief within the meaning of 5 U.S.C. § 702. Suwannee Steamship Company v. United States, 354 F.Supp. 1361 (U.S.Cus.Ct. 1973); Salazar v. Hardin, 314 F.Supp. 1257 (D.Col. 1970). Therefore, plaintiff has presented a claim upon which relief can be granted. 5 U.S.C. §§ 702, 704, 706; C.B.S. Imports Corp. v. United States, 450 F.Supp. 724 (U.S.Cus.Ct. 1978).

CONCLUSION

For the foregoing reasons, it is recommended that an order be entered denying defendants' motion to dismiss.

s/Herman Amasa Smith
United States Magistrate

13 November 1980

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF NORTH CAROLINA
WINSTON-SALEM DIVISION

FOOD TOWN STORES, INC., Plaintiff	)	
v.	)	NO. C-80-240-WS
EQUAL EMPLOYMENT OPPORUNITY COMMISSION, et al, Defendants	)	

MEMORANDUM

GORDON, Chief Judge

This action is brought by Food Town Stores, Inc., a private employer against the Equal Employment Opportunity Commission (EEOC), an agency of the Federal Government. EEOC is charged under

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. (Title VII), with investigative, administrative and enforcement duties.

Food Town seeks a declaratory judgment pursuant to 28 U.S.C. §§ 2201, 2202, that a regulation promulgated by the EEOC is invalid because it conflicts with 42 U.S.C. § 2000e-9 and 29 U.S.C. § 161. Food Town also contends that the regulation in question, 29 C.F.R. § 1601.16(a), is substantive rather than procedural, and therefore, outside of the EEOC's procedural rulemaking authority. Finally, Food Town asks this Court to order the EEOC to issue a subpoena duces tecum to be served upon EEOC Commissioner Ethel Bent Walsh.

This matter is before the Court on the parties' cross motions for summary

judgment. For the reasons stated in this Memorandum, the Court will dismiss this action for lack of subject matter jurisdiction and, in the alternative, will grant the EEOC's motion for summary judgment as to the complaint in its entirety.

UNDISPUTED FACTS

The complaint concerns a charge of systematic discrimination lodged against Food Town by EEOC Commissioner Ethel Bent Walsh on July 11, 1979, and amended on December 4, 1980. The charge alleges that Food Town has discriminated against blacks and women on the basis of race and sex with respect to recruitment, hiring, job assignment, job classification, wages, training promotion, termination and other terms and conditions of employment.

In a letter to Commissioner Walsh dated February 4, 1980, Food Town requested that Commissioner Walsh provide to Food Town the documents and facts upon which she based the charge. Commissioner Walsh responded and denied the request, stating that release of the requested information is governed by the confidentiality provisions of Title VII, 42 U.S.C. § 2000e-5(b) and 8(e).

Food Town then requested that James H. Troy, Director of the EEOC Charlotte District Office, issue to it a subpoena duces tecum pursuant to 42 U.S.C. § 2000e-9 to be served on Commissioner Walsh so that Food Town could inquire into the factual basis for the Commissioner's charge. In a letter dated March 31, 1980, Troy declined, citing Commission regulation 29 C.F.R. § 1601.16(a).

42 U.S.C. § 2000e-9 makes the provision of 29 U.S.C. § 161, § 11 of the Labor Management Relations Act applicable to all investigations conducted by the EEOC. Section 11 of the Labor Management Relations Act provides in part:

> The Board, or any member thereof, shall upon application of any party to such proceedings forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. . . ."

The Regulation cited by Troy, 29 C.F.R. § 1601.16, provides in part:

> "Neither the person claiming to be aggrieved, the person filing a charge on behalf of such person nor the respondent shall have the right to demand that a subpoena be issued."

DISCUSSION

Food Town claims that this Court has jurisdiction over this action under 28 U.S.C. § 1331(a), 1337(a), 1346(a)(2), and 1361. In the Magistrate's Findings and Recommendations filed November 13, 1980, and adopted by this Court on December 3, 1980, it was concluded that jurisdiction was correct under 28 U.S.C. § 1331(a). Upon further consideration and study, it is concluded that this decision is erroneous. Accordingly, the Court must grant EEOC's prior motion to dismiss for lack of subject matter jurisdiction.

Food Town initiated this action against an agency of the Federal Government and employees of the agency in their official capacity. Although the action is nominally against a federal agency and

federal officers, it is in fact against the United States. See Hawaii v. Gordon, 373 U.S. 57 (1963). Therefore, the action is limited by the doctrine of sovereign immunity; Food Town may proceed against the United States only if Congress has waived the immunity by statute. United States v. Testan, 424 U.S. 392 (1976). The four statutes cited by Food Town as being a jurisdictional basis for this action are consistent in that they provide no statutory waiver of sovereign immunity in and of themselves.

28 U.S.C. § 1331 is the general federal question jurisdictional statute. This statute gives the district courts jurisdiction over actions arising under the laws of the United States. However, this section does not constitute a waiver

of the United States' defense of sovereign immunity. Beale v. Blount, 461 F.2d 1133 (5th Cir. 1972).

28 U.S.C. § 1337 gives the district courts original jurisdiction over any action arising under any Act of Congress regulating commerce. This statute does not waive the sovereign immunity of the United States. Foreman v. General Motors Corp., 473 F.Supp. 166 (E.D. Mich. 1979).

28 U.S.C. § 1346(a)(2) gives the district court concurrent jurisdiction with the Court of Claims for any actions against the United States for liquidated damages. This statute is obviously not a basis for jurisdiction in this case. At any rate, the statute does not grant the needed waiver of sovereign immunity in

this matter. See White v. Administrator of General Services Admin. of the United States, 343 F.2d 444 (9th Cir. 1965).

28 U.S.C. § 1361 gives the district courts jurisdiction over any action in the nature of mandamus to compel an officer of the United States to perform a duty owed to the plaintiff. This statute does not constitute a waiver of sovereign immunity. Essex v. Vinal, 499 F.2d 226 (8th Cir. 1974), cert. den. 419 U.S. 1107 (1975).

Food Town claims that the United States has waived sovereign immunity and consented to be sued in this case by way of the Administrative Procedures Act (APA), 5 U.S.C. § 702. The Court cannot agree. 5 U.S.C. § 702 grants a right of

review to "a person suffering a legal wrong because of agency action." 5 U.S.C. § 704 describes those actions that are reviewable as "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to juridicial review." (emphasis added).

It must be pointed out that a determination by the EEOC that there exists probable cause to believe that Food Town has engaged in discriminatory activity would give rise to no liability on the part of Food Town. E.E.O.C v. General Electric Co., 532 F.2d 359 (4th Cir. 1976). In order to enforce its findings, the EEOC would have to file an action against Food Town in federal court. 42 U.S.C. § 2000e-9. Such court actions are

de novo proceedings. McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973).

For any agency action to be final and thus within the purview of the APA's waiver of sovereign immunity, it must have some determinative consequences for the party to the suit. Georator Corp. v. E.E.O.C., 592 F.2d 765 (4th Cir. 1979); Stewart v. E.E.O.C., 611 F.2d 679 (7th Cir. 1979). A finding by the EEOC that there is probable cause to believe that Food Town has engaged in discrimination has no determinative consequences. Likewise, no Commission action leading up to that finding can have any determinative consequences within the meaning of the APA. The United States has not consented to be sued in this action. Accordingly, Food Town has no cause of action.

Finally, Food Town contends that 29 C.F.R. § 1601.16(a) is substantive rather than procedural and therefore outside the EEOC's procedural rulemaking authority. The Court cannot agree. The regulation does not define the rights and duties of the parties, but only prescribes the methods by which the agency acts. The administrative actions of the EEOC do not enforce any rights or impose any obligations. Therefore, this regulation can have no substantive impact on Food Town. See EEOC v. Raymond Metal Products, 530 F.2d 590 (4th Cir. 1977). The EEOC has the authority to promulgate such rules under 42 U.S.C. § 2000e-12(a).

Turning now to Food Town's request for declaratory relief pursuant to 28 U.S.C. §§ 2201, 2202, it has been shown

that Food Town has no federal cause of action. Dismissal for want of a federal cause of action serves to preclude the granting of declaratory relief under 28 U.S.C. §§ 2201, 2202. Covington v. City of Raleigh, 531 F.2d 220 (4th Cir. 1976). For this reason, the complaint will be dismissed in its entirety pursuant to Fed.R.Civ.P. 12(b)(1).

In the alternative, the Court grants EEOC's motion for summary judgment. The issue of the perceived conflict between 29 U.S.C. § 161 and 29 C.F.R. § 1606.16(a) has been addressed on two occasions of which this Court is aware. See EEOC v. Suburban Transit System, 28 FEP Cases 419 (N.D.Ill. 1982); EEOC v. Goodyear Tire & Rubber Co., 21 FEP Cases 1631 (N.D. Ohio 1979). In each case the

regulation in question was found to be a reasonable interpretation of 42 U.S.C. § 2000e-9 in light of the statutory framework of Title VII.

s/Eugene A. Gordon
United States District Judge

May 6, 1982

28 U.S.C. § 1331

Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Former 28 U.S.C. § 1331

Federal Question; Amount in Controversy; Costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the

district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. § 1337

Commerce and Antitrust Regulations; Amount in Controversy, Costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, That the district courts shall have original jurisdiction of an action brought under section 11707 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where a plaintiff who files the case under section

11707 of title 49, originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of any interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. § 1346

United States As Defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any

Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges,

Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while

acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided

in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

28 U.S.C. § 1361

Action to Compel an Officer of the United States to Perform His Duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. § 2201

Creation of Remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2202

Further Relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

29 U.S.C. § 161

Investigatory Powers of Board

For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title--

Documentary evidence; summoning witnesses and taking testimony

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of

any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not

describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

Court aid in compelling production of evidence and attendance of witnesses

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States

courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) Repealed. Pub.L. 91-452, Title II, § 234, Oct. 15, 1970, 84 Stat. 930.

Process, service and return; fees of witnesses

(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed

or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

Process, where served

(5) All process of any court to which application may be made under this subchapter may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

Information and assistance from departments

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

42 U.S.C. § 2000e-8.

Investigations

(a) In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of

carrying out its functions and duties under this subchapter and within the limitations of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or

class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.

(c) Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing,

as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any

employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If

any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to

any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any

information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

42 U.S.C. § 2000-9

Conduct of Hearings and Investigations Pursuant to Section 161 of Title 29

For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of Title 29 shall apply.

42 U.S.C. § 2000e-16

Employment by Federal Government

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive

service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall--

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment.

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to--

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance

so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be

taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his

responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

29 C.F.R. § 1601.16

Access to and Production of evidence; testimony of witnesses; procedure and authority.

(a) To effectuate the purposes of Title VII, any member of the Commission shall have the authority to sign and issue a subpoena requiring:

(i) the attendance and testimony of witnesses;

(ii) the production of evidence including, but not limited to, books, records, correspondence, or documents, in the possession or under the control of the person subpoenaed; and

(iii) access to evidence for the purposes of examination and the right to copy.

Any District Director, the Program Director, Office of Program Operations or upon delegation, the Director of Systemic Programs, Office of Program Operations or the Directors, Regional Programs, Office of Program Operations, or any representatives designated by the Commission, may sign and issue a subpoena on behalf of the Commission. The subpoena shall state the name and address of its issuer, identify the person or evidence subpoenaed, the person to whom and the place, date, and the time at which it is returnable or the nature of the evidence to be examined or copied, and the date and time when access is requested. A subpoena shall be returnable to a duly authorized investigator or other representative of the Commission. Neither the person

claiming to be aggrieved, the person filing a charge on behalf of such person nor the respondent shall have the right to demand that a subpoena be issued.

(b) Any person served with a subpoena who intends not to comply therewith shall within five days (excluding Saturdays, Sundays and Federal legal holidays) after the date of service of the subpoena upon him or her, petition the General Counsel by mail to revoke or modify the subpoena. Such petition shall be mailed to 2401 E Street NW., Washington, D.C. 20506, and a copy thereof shall be served on the person who issued the subpoena. The petition shall separately identify each portion of the subpoena with which the petitioner does not intend to comply and shall state with

respect to each such portion, the grounds upon which the petitioner relies. A copy of the subpoena shall be attached to the petition and shall be designated "Attachment A." Within eight days after receipt thereof or as soon thereafter as practicable, the General Counsel shall make a determination upon the petition, stating reasons, and shall submit the petition and determination to the Commission for its review. The Commission shall review the petition and make a final determination. A commissioner who has issued a subpoena shall abstain from reviewing any petition to modify or revoke the subpoena. The Commission shall serve a copy of the final determination of the petition upon the petitioner. For purposes of this section, service shall be

made and proof thereof established pursuant to section 11(4) of the National Labor Relations Act, as amended, 29 U.S.C. 161(4), as made applicable to Commission hearings and investigations by section 710 of Title VII; Provided, however, That whenever the subpoena was issued by the District Director, the Program Director, Office of Program Operations, Director of Systemic Programs, Office of Program Operations, or Directors, Regional Programs, Office of Program Operations, the petition to revoke or modify the subpoena shall be mailed to the Director, within the 5 day period specified above, who will make a determination on the petition. Any petitioner who wishes to appeal the determination of the Director shall do so by following the standard procedures specified

above. Such appeal shall, in addition, be clearly labeled as "Appeal of Petition to Revoke or Modify Subpeona," and shall attach the initial petition and determination, designated as "Attachments B and C." No argument not presented to the District Director, the Program Director, Office of Program Operations, Director of Systemic Programs, Office of Program Operations, or Directors, Regional Programs, Office of Program Operations, will be considered by the Commission.

(c) Upon the failure of any person to comply with a subpoena issued under this section, the Commission may utilize the procedures of section 11(2) of the National Labor Relations Act, as amended, 29 U.S.C. 161(2), to compel enforcement of the subpoena.

(d) Witnesses who are subpoenaed pursuant to § 1601.16(a) shall be entitled to the same fees and mileage that are paid witnesses in the courts of the United States.

Office-Supreme Court, U.S.
FILED
DEC 21 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-508

In the Supreme Court of the United States

OCTOBER TERM, 1983

FOOD LION, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in upholding an Equal Employment Opportunity Commission regulation which provides that private parties may not demand the issuance of a subpoena during the investigatory stage of the Title VII enforcement process.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4-A30) is reported at 708 F.2d 920. The opinion of the district court (Pet. App. A62-A75) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1983. A petition for a writ of certiorari was filed on September 24, 1983. A petition for rehearing was denied on June 28, 1983 (Pet. App. A2). The jurisidiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On July 11, 1979, Ethel Bent Walsh, then a Commissioner of the Equal Employment Opportunity Commission, filed a charge against petitioner alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.* (Pet. App. A7). During the course of the

Commission's investigation into the charge, petitioner refused to produce any of the information requested by the Commission and requested that the Commission issue a subpoena duces tecum on its behalf "to compel the testimony of Commissioner Walsh concerning the factual basis of the charge" (Pet. App. A7). On March 31, 1980, the Commission, relying on 29 C.F.R. 1601.16(a)3, denied petitioner's request.[1]

The Commission ultimately subpoenaed the employment information withheld by the petitioner, and the petitioner, in turn, sought administrative revocation of the subpoena (Pet. App. A8). While its revocation petition was pending, the petitioner brought this action to compel the Commission to issue a subpoena duces tecum requiring Commissioner Walsh to submit to a deposition (*id.* at A9). Petitioner alleged that Commissioner Walsh's testimony was necessary "to resist any EEOC attempt to enforce its subpoena" (*ibid.*).

Petitioner's administrative revocation petition was subsequently denied, and the Commission, on April 1, 1981, filed an action to enforce its subpoena (Pet. App. A9). That action was subsequently dismissed, when petitioner agreed to comply with the Commission's subpoena (*id.* at A10).

Nothwithstanding its compliance with the Commission's subpoena, petitioner continued its efforts to compel Commissioner Walsh's testimony (Pet. App. A10). The district court, however, granted the Commission's motion for summary judgment (Pet. App. A62-A75). The court rejected

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[1] 29 C.F.R. 1601.16(a)(3) provides in pertinent part:

> Neither the person claiming to be aggrieved, the person filing a charge on behalf of such person nor the respondent shall have the right to demand that a subpoena be issued.

petitioner's assertion that Section 710 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-9, requires the Commission to issue subpoenas to private parties during the investigatory stage of the Title VII enforcement process.[2] The court held that 29 C.F.R. 1601.16(a)(3), which provides that the Commission will not issue subpoenas to charging parties or respondents during its investigation, is fully consistent with congressional intent.[3]

The court of appeals affirmed (Pet. App. A30). The court noted that Section 710 incorporates the provisions of Section 11 of the National Labor Relations Act, 29 U.S.C. (& Supp. V) 161, which consistently has been interpreted as not requiring "the issuance of investigative subpoenas to private parties" (Pet. App. A23). The court concluded that the legislative history of Section 710 clearly indicates that "the EEOC, like the NLRB, would not be required to issue investigative subpoenas under that section" (*id.* at A24).

The court of appeals also recognized that the issuance of subpoenas to respondents during Commission investigations could lead to undue delay in the enforcement of Title VII. The court stated that (Pet. App. A29):

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[2]42 U.S.C. 2000e-9 provides:

> For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of title 29 shall apply.

29 U.S.C. (& Supp. V) 161 provides in pertinent part:

> The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application.

[3]The district court also held, in the alternative, that it lacked subject matter jurisdiction over petitioner's action. The court of appeals reversed this portion of the district court's judgment (Pet. App. A11).

> [t]he prospect of extensive delay in EEOC investigations, a risk especially inherent in private party subpoenas of EEOC officials, is a significant consideration in our decision inasmuch as we believe that 29 C.F.R. § 1601.16(a) properly and necessarily shields Title VII's enforcement scheme from such extensive delay.

Relying on *EEOC* v. *K-Mart Corp.*, 694 F.2d 1055 (6th Cir. 1982), the court concluded that discovery by private parties during a Commission investigation would be appropriate only where the respondent makes a substantial showing that enforcement of a subpoena would be an abuse of the court's process (Pet. App. A28). The court of appeals held that, since there was no such showing here, discovery was not appropriate (*id.* at A29).

ARGUMENT

Further review of the question presented by petitioner is not warranted because, as petitioner acknowledges (Pet. 6), "[t]here is no conflict in the circuits on this issue." In fact, the court below is the only court of appeals that has addressed the issue, and the two district courts that have addressed the question have reached the same result. See *EEOC* v. *Suburban Transit System*, 28 Fair Empl. Prac. Cas. (BNA) 419 (N.D. Ill. 1982); *EEOC* v. *Goodyear Tire & Rubber Co.*, 21 Fair Empl. Prac. Cas. (BNA) 1631 (N.D. Ohio 1979). The only court of appeals that has addressed the issue in the NLRA context has held that the parallel NLRB interpretation of 29 U.S.C. (& Supp. V) 161 is valid. See *Martins Ferry Hospital Ass'n* v. *NLRB*, 654 F.2d 455 (6th Cir. 1981). See also *Schrementi Bros.* v. *McColloch*, 69 L.R.R.M. 2233 (N.D. Ill. 1968). Moreover, the court of appeals' ruling assists in the efficient administration of the law, and its construction of 29 U.S.C. (& Supp. V) 161, as incorporated by Section 710 of Title VII, is in complete harmony with the interpretation of both agencies that utilize the statute.

1. Petitioner asks this Court mechanically to apply a single sentence from 29 U.S.C. (& Supp. V) 161 to reach a result that is clearly at odds with congressional intent (Pet. 7-11). In construing Title VII, however, the Court should look to the statute as a whole to ascertain congressional intent, thereby giving effect to the legislative will. See *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975). A comprehensive, remedial statute such as Title VII must be interpreted to give it the most harmonious, comprehensive meaning possible in light of legislative policy and purpose. *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-632 (1973). Where, as here, petitioner's literal reading of Section 710 leads to a result that is inconsistent with the clear intent of Congress, the words of the statute must be interpreted in light of legislative intent. *United States* v. *Campos-Serrano*, 404 U.S. 293, 298 (1971); *Lynch* v. *Overholser*, 369 U.S. 705, 710 (1962); *United States* v. *Public Utilities Comm'n*, 345 U.S. 295, 315 (1953); *United States* v. *Brown*, 333 U.S. 18 (1948).

In this case, the inescapable conclusion from the legislative history of Title VII is that Congress, in applying 29 U.S.C. (& Supp. V) 161 to Commission investigations, intended to make those investigations subject to the same procedures applicable to NLRB investigations. Congress was undoubtedly aware of the NLRB's practice of not issuing investigative subpoenas on behalf of private parties.[4] Congress, moreover, clearly expressed its approval of

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[4]See NLRB Casehandling Manual § 11770 (1975), which provides in pertinent part (emphasis added):

> *Investigative subpoenas:* During certain investigations, in both R and C cases, resort to subpoenas will be necessary in order to ascertain the facts on which to base an administrative decision on the merits.
>
> (Since the object of investigative subpoenas is the ascertainment of facts on which administrative decisions may be based, they should not be used *after* a regional decision to issue a complaint

the NLRB practice in enacting Section 710. The Senate report on the legislation which eventually became Section 710 states that the section "accord[s] with the actual practice of the National Labor Relations Board." Section-by-section analysis of S. 2515, 92d Cong., 1st Sess. 40 (1971), *reprinted in Legislative History of the Equal Employment Opportunity Act of 1972*, at 1977 (1972) [hereinafter cited as *Leg. Hist.*].[5]

2. Petitioner's reliance (Pet. 10-15) on differences between the enforcement procedures of Title VII and those of the NLRB is misplaced. Whatever the differences between EEOC and NLRB enforcement procedures, the investigative procedures of both agencies are nearly identical. Upon the filing of a charge of discrimination or an unfair labor practice, the Commission or the NLRB, respectively, conducts an administrative investigation to determine whether an adversarial action should be filed against an alleged perpetrator. During this period, neither agency will issue investigative subpoenas on behalf of private parties. See 29 C.F.R. 1601.16(a)(3); NLRB Case Handling Manual § 11770 (1975). The reason for this is simple and applies with equal force to each agency: the administrative investigation is conducted by the government, not the charging party or respondent. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242 (1980).

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unless the Division of Operations Management clearance has been procured).

There is no comparable right to an investigative subpoena available to parties other than General Counsel.

[5]Petitioner dismisses the section-by-section analysis of S.2515 because that bill was not enacted. That analysis, however, clearly demonstrates that Congress was aware of the NLRB's practices regarding the issuance of investigative subpoenas. Moreover, although S.2515 was not enacted, Section 710 was derived unchanged from S.2515. In these circumstances, the plainly stated intent of the drafters of S.2515 should not be disregarded.

Only after completion of the administrative investigation and upon initiation of adversarial proceedings do Title VII and the NLRA differ significantly. Under the NLRA the complaint that initiates an adversarial hearing is filed with the NLRB, 29 U.S.C. 160, whereas under Title VII the Complaint is filed with the appropriate United States District Court, 42 U.S.C. 2000e-5(f).[6] At that point, private parties are, for the first time, permitted to obtain supboenas in both EEOC and NLRB proceedings. See Fed. R. Civ. P. 45.

3. In incorporating 29 U.S.C. (& Supp. V) 161 into Title VII, Congress was not unmindful of the possibiliby that, because of the differences between the enforcement scheme of Title VII as finally amended and the NLRA, not all of the provisions of Section 161 could be mechanically applied to Title VII. The section-by-section analysis of the final version of Section 710 evidences this awareness by stating that 29 U.S.C. (& Supp. V) 161 is applicable to Title VII only "to the extent appropriate." Section-by-Section Analysis of H.R. 1746, 92d Cong., 1st Sess. (1971) and S.2515, *supra*, *reprinted in Leg. His.* 1849, 1775. "Congress thereby conferred discretion upon the EEOC to promulgate appropriate guidelines for the use of 29 U.S.C. § 161 powers in EEOC investigations" (Pet. App. A26). The regulation challenged by petitioners is clearly within the legitimate scope of that discretion.

As found by the court of appeals (Pet. App. A27-A29), issuance of investigative subpoenas on behalf of interested parties at the very outset of the EEOC's administrative

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[6]In 1972, when Section 710 was first proposed, Congress contemplated the conferral of cease and desist authority upon the Commission, similar to that of the NLRB. Title VII as amended, however, did not include that authority, but instead provided for formal enforcement actions in federal district court. 42 U.S.C. 2000e-5(f).

investigation of a charge would unduly disrupt the Title VII enforcement scheme. Routine probing of the Commission's processes, like that sought by the petitioner here, would thwart congressional intent by resulting in " 'extensive delay in the disposition of Title VII cases' " (*id.* at A28 (quoting *EEOC* v. *K-Mart Corp.*, 694 F.2d at 1067)). The court of appeals therefore properly sustained the validity of 29 C.F.R. 1601.16(a).

There can be no doubt that, under the NLRB's subpoena policy, a request like petitioner's for a subpoena to explore the basis for an unfair labor practice charge during an investigation by the Board would be turned down under Section 161. Petitioner, however, argues that the same request, under the same statutory authority, made to the Commission during its investigation of a Title VII charge must be granted. The courts below properly rejected this result as contrary to evident congressional intent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1983

DOJ-1983-12